DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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NILE EXPRESS TRANSPORT, INC. Appellant, v. DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Appellee	Case No. BA-C-07-80028

FINAL ORDER ON MOTION FOR SUMMARY JUDGMENT

I. Introduction

Appellant, Nile Express Transport, Inc. ("Nile") appeals from a decision of the District of Columbia Department of Health ("DOH") terminating Nile's provider agreement with the District for transportation services for Medicaid recipients. At a prehearing conference on March 8, 2007, counsel for the Government advised that the Government intended to file a motion for summary judgment because, in the Government's view, the essential facts were undisputed. I set a schedule for briefing and argument of the motion in a Case Management Order issued on March 12, 2007. The Government filed its Motion for Summary Judgment on April 19. Nile filed its opposition on May 7, supplemented with supporting declarations and an amended memorandum of points and authorities on May 10. The parties argued the motion on July 11, 2007. For reasons I discuss below, I conclude that DOH is justified in terminating the agreement as a matter of law and I grant the Motion for Summary Judgment.

The Government's demand and Nile's refusal to permit inspection, arise out of a related appeal that Nile filed on September 28, 2006, *Nile Express Transp., Inc. v. DOH*, OAH No. BA-C-06-80023. Following an accident in which a passenger in Nile's van was killed, the Government suspended Nile's provider agreement. Nile appealed, and the Government conceded that it was not entitled to suspend the provider agreement under the applicable regulations. Nile then moved for summary judgment to obtain damages for the loss of business it suffered. The Government cross-moved for summary judgment to dismiss the appeal on the grounds that this administrative court was not authorized to award damages. While the motions were pending, the parties entered into settlement discussions. The Government's request to inspect Nile's transportation logs was an attempt to verify the damages that Nile claimed.

II. Findings of Fact

For purposes of this Motion for Summary Judgment I find that the following facts are supported by admissible evidence that is either undisputed or construed in the light most favorable to Nile, the nonmoving party. These findings incorporate findings of fact contained in my Final Order on Motions for Summary Judgment in *Nile Express Transp., Inc. v. DOH*, OAH No. BA-C-06-80023 (Final Order, April 27, 2007) (the "April 27 Final Order.")

1. At all material times Nile Express Transport, Inc. and the District of Columbia were parties to a Medicaid provider agreement (Appellee's Mot. for Summ. J., Ex. 6) under which Nile contracted to provide transportation services to Medicaid recipients in the District of Columbia (the "Provider Agreement"). (April 27 Final Order, Finding of Fact No. 1.)

2. On September 21, 2006, the District of Columbia Department of Health Medical Assistance Administration ("MAA") notified Nile that the MAA was suspending the Provider

Agreement while it investigated an accident involving one of Nile's vehicles. (April 27 Final Order, Finding of Fact No. 2.) Nile appealed the suspension to this administrative court on September 28, 2007, *Nile Express Transp., Inc. v. DOH*, OAH No. BA-C-06-80023.

3. By letter dated October 27, 2006, the MAA advised Nile that it was withdrawing the suspension effective that date. (April 27 Final Order, Finding of Fact No. 3.)

4. On December 22, 2006, Tina Watson Travis, Chief Operating Officer of Nile, sent a letter to Assistant Attorney General Sheryl Johnson, at the Department of Health, proposing settlement of Nile's claim for damages arising out of the suspension for $110,382. The letter contained a spreadsheet giving names and dates of certain passengers that Nile had transported. (Appellee's Mot. for Summ. J., Ex. 8.)

5. On January 9, 2007, Ms. Johnson sent a letter to Ms. Travis, asking Nile to provide copies of its daily transportation logs (the "Logs") for certain dates in July, August, and September, 2006, and to make the Logs beginning June 1, 2006, available for inspection. The letter stated that the MAA needed the information "in its projection of utilization of services during the period of time services were suspended." The letter further stated that "A representative from MAA will pick up the documents on Thursday, January 11th, 2006 and review the daily transportation logs." (Appellee's Mot. for Summ. J., Ex. 1.)

6. After Nile received the Government's letter, Wanda R. Withers, Nile's Risk Management Officer, telephoned Ms. Johnson and told her that the Logs would not be produced because they constituted discovery materials relating to the pending appeal before OAH. (Withers Decl., Appellant's Opp'n., Ex. P 6, ¶ 3.)

7. On January 11, 2007, Linda Brock, an MAA investigator, and Diallo "Abe" Bennett, Chief of the MAA Office of Investigations and Compliance, arrived at Nile's offices and asked to inspect the Logs. Ms. Withers refused to permit inspection of the documents. (Brock Aff., Appellee's Mot. for Summ. J., Ex. 2, ¶¶ 3, 6; Bennett Aff., Appellee's Mot. for Summ. J., Ex. 3, ¶¶ 3, 6; Withers Decl., Appellant's Opp'n. Ex. P 6, ¶ 4.)

8. Nile's Logs were inspected by an MAA inspector in July, 2006. (Travis Decl., Appellant's Opp'n. Ex. P 5, ¶ 5.)

9. Nile maintained the Logs in compliance with the Provider Agreement. (Travis Decl., Appellant's Opp'n. Ex. P 5, ¶ 4.)

10. On January 11, 2007, Robert T. Maruca, Senior Deputy Director of MAA, sent Ms. Travis a letter notifying Nile of the MAA's intent to terminate the Provider Agreement between MAA and Nile on account of Nile's refusal to make the Logs available to MAA. (Appellee's Mot. for Summ. J., Ex. 4.)

11. On January 23, 2007, Nile filed an appeal of the MAA's proposed termination decision with the Office of Administrative Hearings.

12. On February 13, 2007, after Nile continued to refuse to make the Logs available to MAA, Mr. Maruca sent a letter to Ms. Travis notifying Nile that the Provider Agreement was terminated as of March 1, 2007. (Appellee's Mot. for Summ. J., Ex. 5.)

13. On April 27, 2007, this administrative court issued its Final Order in Case No. BA-C-06-80023.

III. Appellee's Motion for Summary Judgment

The Government asserts three interrelated arguments in support of its motion:[1]

(1) The Government contends that that Nile violated the provisions Section 1.G of the Provider Agreement that require it to "[p]rovide full access" of its records, including the Logs, to duly authorized DOH representatives "for audit purposes." The Government also submits that Nile is in violation of Section 1.C of the Provider Agreement, which requires compliance with the Social Security Act and "standards prescribed by Federal and State standards," and Section 1.F, which requires the provider to "maintain all records relevant to this Agreement." (Appellee's Mot. for Summ. J., Ex. 6.) Because Nile refused to make the Logs available, the Government contends that it may terminate the provider agreement under 29 District of Columbia Municipal Regulations ("DCMR") 1302.1 (c).

(2) The Government submits that Nile's refusal constitutes a violation of the federal Medicaid regulations, 49 C.F.R. § 431.107(b), which prescribes that Medicaid provider agreements require providers to "[k]eep any records necessary to disclose the extent of services the provider furnishes to recipients," and "[o]n request, furnish to the Medicaid agency . . . any information regarding payments claimed by the provider for furnishing services under the plan."

(3) The Government urges that Nile's action is also a direct violation of the District of Columbia Municipal Regulations, which require that a party to a Medicaid provider agreement

[1] A fourth argument raised by the Government, that Nile failed to furnish requested information in support of payments made under Medicaid, is, in essence, a restatement of its other arguments, so I will not consider it separately. Because Nile has submitted sworn declarations that it maintained the logs properly, I must assume for purposes of this motion that Nile maintained the Logs, as required by the regulations, so I also will not consider the Government's argument that Nile's alleged failure to maintain the Logs constituted a breach of the Provider Agreement.

"shall allow appropriate personnel . . . full access to all records during announced and unannounced audits and reviews." 29 DCMR 1907.1.

In its opposition to the Government's Motion for Summary Judgment, Nile acknowledged that it refused to make the Logs available to the Government inspectors. But Nile asserts that it maintained the Logs as required by law and had previously made them available to the inspectors for an audit in the summer of 2006. Nile asserts that it was not required to produce the Logs because: (1) The Government's request was not undertaken for audit purposes, but rather to give the Government an unfair advantage in settlement negotiations; (2) "neither the law nor the Provider Agreement prescribe [Nile's] production of the Logs for settlement purposes;" and (3) the OAH Establishment Act, D.C. Official Code § 2-1831.13(c), prohibits the Government from threatening termination of the Provider Agreement or terminating the Agreement while litigation was pending before this administrative court.[2]

IV. Conclusions of Law

The principles underlying summary judgment that I discussed in the previous appeal between these parties apply equally to the current motion. OAH Rule 2828 states "motions for summary adjudication or comparable relief may be filed in accordance with Rule 2812." OAH Rule 2812 sets forth the procedures for filing motions, but does not speak specifically to motions for summary judgment. Under OAH Rule 2801.2, "Where a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court

[2] In a post-argument submission the Government contended that D.C. Official Code § 2-1831.13(c) did not exist. The Government is wrong. The provision is contained in the 2007 LEXIS District of Columbia Code Annotated. It was enacted in Section 16 of the OAH Establishment Act, D.C. Law 14-196, 48 D.C. Reg. 11,442, 11,457 (Mar. 6, 2002).

may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority."

The summary judgment standard set forth in the Super Ct. Civ. R. 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The District of Columbia Court of Appeals described the substantive standard for entry of summary judgment in *Behradrezaee v. Dashtara*, 910 A.2d 349, 364 (D.C. 2006):

> Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. GLM P'ship v. Hartford Cas. Insu. Co., 753 A. 2d 995, 997-998 (D.C. 2000) (citing Colbert v. Georgetown Univ., 641 A.2d 469, 472 (D.C. 1994) (en banc)). 'A motion for summary judgment is properly granted if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof.' Kendrick v. Fox Television, 659 A.2d 814, 818 (D.C. 1995) (quoting Nader v. de Toledano, 408 A.2d 31, 42 (D.C. 1979)).

Although the moving party has the burden of demonstrating the absence of a genuine issue of material fact, "Once the movant has made such a prima facie showing, the nonmoving party has the burden of producing evidence that shows there is 'sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Kendrick v. Fox Television*, 659 A.2d 814, 818 (D.C. 1995) (quoting *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979).

Following these principles, I must assume for purposes of this motion that Nile's factual contentions are correct. Specifically, I must assume that the MAA inspectors asked to inspect Nile's Logs to obtain information that MAA could use in the ongoing settlement negotiations and that the inspection had no other purpose. I also assume that Nile maintained the Logs as required by the Provider Agreement and the governing regulations and would have made the Logs available for inspection if they had been requested for a reason that Nile considered to be authorized.

The starting point for any analysis is the Provider Agreement, the provisions of which are the core of Nile's obligations to MAA. Paragraph I G of the Agreement provides that the Provider agrees:

> To provide full access to these records to authorized personnel of the Department, the United States Department of Health and Human Services, the Comptroller General of the United States or any of their duly authorized representatives for audit purposes.

Appellee's Mot. for Summ. J., Ex. 6.

The key to the interpretation of the Provider Agreement and Nile's consequent obligations is the meaning of the term "audit purposes." Nile contends that the obligation to produce records does not apply in these circumstances because the Government's inspection was not undertaken for "audit" purposes, but rather for purposes of discovery. The Government argues that the term "audit purposes" is broad enough to encompass the inspection that was attempted here. The Government cites dictionary definitions of "audit" as "an examination of records or financial accounts to check their accuracy" (American Heritage College Dictionary 4th ed.), and "an examination of records to check their accuracy" (Webster's New College Dictionary). Appellee's Submission of Additional P. & A. at 2.

Neither the Provider Agreement nor the governing federal or District regulations define an "audit." Other dictionary definitions of "audit" are less favorable to the Government because they imply that the audit procedure should be formal and comprehensive Black's Law Dictionary (8th ed. 2004) defines audit as: "A formal examination of an individual's or an organization's accounting records, financial situation, or compliance with some other set of standards." The first definition of "audit" given in Merriam-Webster on line is "a formal examination of an organization or an individual's accounts or financial situation." http://www.m-w.com/dictionary/audit.

Although the Government's proposed inspection here was not required by statute or regulation and was not part of a comprehensive investigation of Nile's accounting practices, I conclude that it qualifies as an audit within the meaning of the Provider Agreement. Nile had claimed loss of income on account of the Government's suspension of its services. The Government sought to verify that loss of income through a review of the Logs. The review constituted a formal examination of Nile's accounting records to evaluate the provider's compliance with the regulatory standards.

The applicable federal and District regulations confirm that the term "audit," as used in the Provider Agreement, should be given a broad interpretation. The federal regulations require that a provider "[k]eep any records necessary to disclose the extent of services the provider furnishes to recipients," and "[o]n request, furnish to any Medicaid agency . . . any information maintained . . . and any information regarding payments claimed by the provider for furnishing services under the plan." 42 C.F.R. § 431.107(b) (1), (2). The District regulations, in turn, provide that: "Each provider shall allow appropriate personnel of MAA . . . full access to all records during announced and unannounced audits and reviews." These regulations indicate that

the MAA's right to inspect provider records is not limited to formal comprehensive audits, but applies to any kind of "review" that the MAA may deem necessary.

Moreover, the MAA's right to gain access to the Logs is consistent with the purpose of the governing regulations to avoid fraud and waste in Government spending. Nile was demanding money from the Government for alleged lost opportunities. Its documentary support for the claim was sparse. *See* Appellee's Mot. for Summ. J., Ex. 8. A review of the Logs would ensure that Nile's claims were not fabricated or exaggerated. It is irrelevant that Nile and MAA were engaged in settlement negotiations in an ongoing case before this administrative court. The Provider Agreement and the federal and District regulations make no exception for matters in litigation. Nor do the rules of this administrative court prohibit parties engaged in litigation from exercising contractual rights that may bear on that litigation.

I conclude, therefore that the Government had a right to inspect the Logs under the Provider Agreement and the governing regulations. The remaining question is whether D.C. Official Code § 2-1831.1(c) protects Nile from having to comply with the Government's demand. I conclude that it does not.

D.C. Official Code § 2-1831.1(c) provides:

> When a case is brought before the Office, any agency that is a party shall take no further decisional action with respect to the subject matter in issue, except in the role of a party litigant or with the consent of all parties, for so long as the Office has jurisdiction over the proceeding.

Although Nile's previous appeal, BA-C-06-80023, was still pending when the Government asked to inspect the Logs, the request did not implicate the Code prohibition

because it did not directly relate to "the subject matter at issue," which was the suspension of Nile's Provider Agreement. Moreover, the request did not constitute a "decisional action." Therefore the OAH Rule did not bar the Government from demanding inspection of the Logs.

Arguably, the Government's decision to terminate Nile's Provider Agreement on account of its refusal to produce the Logs violated the D.C. Code because it constituted a "decisional action" made outside its role as party litigant after Nile filed the present appeal. *See* Appellee's Mot. for Summ. J., Ex. 5. But the issue arose only because Nile did not follow the proper procedure to take an appeal. Nile's appeal to this administrative court was based on the Government's letter of January 11, 2007, announcing its intent to terminate the Provider Agreement. (Appellee's Mot. for Summ. J., Exh. 4.) Under the applicable regulations this letter did not constitute a notice of termination from which an appeal could be taken to this administrative court. *See* 29 DCMR 1303.1, 1303.5. Properly, Nile should have responded to the Government's January 11 notice by exercising its right "to submit documentary evidence and written argument against the proposed decision." (Appellee's Mot. for Summ. J., Exh. 5.) Nile's right to appeal arose from the Government's February 13, 2007, notice of termination, as the notice specified. (Appellee's Mot. for Summ. J., Exh. 5, at 2.) *See* 29 DCMR 1303.5.

In retrospect, it appears that this administrative court assumed jurisdiction improperly by accepting an appeal based on the Government's notice of intent to terminate rather than from the notice of termination itself. However, the issue is now moot, as Nile has appealed and the Government has issued the notice of termination. Under the governing regulations the Government's proposed action "shall be stayed pending a decision following final action by the [Office of Administrative Hearings]. 29 DCMR 1305.5. There is no evidence in the record that the Government has not complied with this requirement.

Moreover, even if the Government's termination were in violation of the Code, it is not clear that this administrative court has any power to fashion a remedy. As I explained in the April 27 Final Order in the companion case, No. BA-C-06-80023, the authority of OAH in Medicaid provider cases is limited to the power to "[s]uspend, revoke, or deny a license or permit," D.C. Official Code § 2-1831.09(b)(9).[3] This administrative court does not have the power to hold parties in contempt. Nor can it award damages.

In sum, I conclude that the Government was entitled to terminate Nile under the Provider Agreement and the governing federal and District regulations, notwithstanding that the MAA sought access to the Logs to obtain information to use in settlement negotiations. I also conclude that the Government's demand to inspect the Logs was not barred by D.C. Official Code § 1831.1(c). Accordingly, I conclude that there is no genuine issue of material fact in dispute and that the Government is entitled to summary judgment as a matter of law.

[3] The Code also permits OAH to "[i]mpose monetary sanctions for failure to comply with a lawful order," D.C. Official Code § 2-1831.09(b)(8). Nile's contention here is not that the Government failed to comply with any order, but that it violated a restriction of the D.C. Code.

V. Order

Therefore, it is this **24th** day of **October, 2007,**

ORDERED that Appellee's Motion for Summary Judgment is **GRANTED;** and it is further

ORDERED that this appeal is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that, pursuant to OAH Rule 2832, either party may file a motion for reconsideration within ten days of service of this Order; and it is further

ORDERED that the appeal rights of any party aggrieved by this Final Order are set forth below.

October, 24 2007

/s/_____
Nicholas H. Cobbs
Administrative Law Judge